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TOMMY OLMSTEAD, Commissioner of the Department  
of Human Resources of the State of Georgia, et al.,

Petitioners,

vs.

L.C. and E.W., each by JONATHAN ZIMRING,  
as guardian ad litem and next friend,

Respondents.

**On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Eleventh Circuit**

**AMICUS CURIAE BRIEF OF THE STATES OF  
FLORIDA, ET AL., IN SUPPORT OF PETITIONERS\***

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## INTEREST OF AMICI

Amici are all states and a territory which provide various services and programs for treatment and habilitation of individuals with disabilities. The decision of the Eleventh Circuit in L.C. by Zimring v. Olmstead, 138 F.3d 893 (11th Cir. 1998), dramatically impacts Amici in many ways. The opinion has been relied upon in several lawsuits designed to reshape the manner in which services (*not provided to nondisabled persons*) are provided by the states to individuals with disabilities. Also, the opinion has created uncertainty on the part of the states as to the continued viability of institutionalized care of individuals with disabilities. In an environment of limited fiscal resources, the states require a prompt determination by this Court as to whether Title II of the Americans with Disabilities Act, Title 42 U.S.C. §12132 (ADA), and the Integration Rule<sup>1</sup> require the delivery of "disability services" (i.e., services that are provided for habilitation and treatment of disabilities and *are not available to nondisabled persons*) in the most integrated community setting available.

## SUMMARY OF ARGUMENT

In L.C. by Zimring, 138 F.3d, at 902, the Eleventh Circuit held "that where . . . a disabled individual's treating professionals find that a community-based placement is appropriate for the individual, the ADA imposes a duty to provide treatment in a community setting--the most integrated setting appropriate to that patient's needs." In reaching this conclusion, the Eleventh Circuit relied upon an interpretation of the Integration Rule which *first appeared in 1994*, several years after the ADA was enacted. This

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<sup>1</sup>/This rule provision is also referred to as the Integration Mandate, 28 C.F.R. §35.130(d).

1994 interpretation was accorded undue deference below. Amici strongly contend that the current U. S. Department of Justice (DOJ) interpretation of the Integration rule is neither mandated by the express language of the ADA nor reasonable.

Furthermore, in holding that the ADA required such community-based services, the Eleventh Circuit deviated from the established jurisprudence of this Court that the ADA and its predecessor, the Rehabilitation Act of 1973, Title 29 U.S.C. §794 (§504), were designed to ensure *evenhanded* treatment between individuals with disabilities and nondisabled persons. The effect of the Eleventh Circuit holding is to afford preferential treatment to individuals with disabilities, because it requires the provision of services *available to disabled individuals only* in a community-based setting.

Alternatively, to the extent that the ADA obligates states to provide substantive services to its citizenry in a community-based setting, it violates the Tenth and Eleventh Amendments to the United States Constitution.

## **ARGUMENT**

### **I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.**

#### **A. The impact on the states' delivery of services to individuals with disabilities.**

The impact of the Eleventh Circuit's opinion on the provision of services to individuals with disabilities is quite profound, and

cannot be limited to the delivery of services to mentally ill persons in institutions. In Florida, the Integration Rule (and the construction of that rule applied by the Eleventh Circuit) has been relied upon, in part, in a series of class action lawsuits which address the manner in which services are provided to individuals with developmental disabilities. Those individuals who currently reside in and receive habilitation and treatment from the State of Florida's developmental services institutions<sup>2</sup> (D.S.I.s) argue that the ADA and the Integration Rule require that the D.S.I.s be shut down, and that these individuals be placed in inclusive community-based settings.

Those individuals with developmental disabilities already receiving services in inclusive community settings have also sued the state, asserting that the Integration Rule and the ADA require that they receive more services in order to avoid placement in an institution or a less integrated setting like an Intermediate Care Facility for the Mentally Retarded or a nursing home. In every instance, the services at issue are services that are provided to the plaintiffs because of their developmental disabilities, and are not available to nondisabled persons.

The Integration Rule has also been relied upon in an action seeking to close one of Florida's state mental hospitals. If successful, this action will result in other similar lawsuits. Such litigation will severely impact the remaining state mental hospitals.<sup>3</sup>

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<sup>2</sup>/Developmental Services Institutions are owned and operated by the State of Florida, and house and provide treatment and habilitation for some of Florida's profound and severely developmentally disabled adults. §393.063(12), Fla. Stat. (1997).

<sup>3</sup>/There is a difference of opinion in the mental health field regarding the value

Also, Florida's Protection and Advocacy System (P & A) [see Title 42 U.S.C. §6042 *et seq.*] has been granted leave to intervene in a nursing home receivership action. The P & A is seeking the transfer of all individuals with disabilities who are currently cared for in a failed nursing home to inclusive community-based placements rather than other nursing homes.

Similar lawsuits have been filed in other states. In Williams v. Wasserman, 937 F.Supp. 524, 526 (D.Md. 1996), plaintiffs brought an ADA claim,<sup>4</sup> challenging the alleged failure of Maryland to implement the recommendations of treating professionals and/or the parties' experts to provide community-based rather than institutional care. That case is still pending.

Also, Maryland's P & A has sued to close a facility which provides treatment for individuals with developmental disabilities. Additionally, Maryland's P & A has sued to force the State to care for an elderly mentally ill person in a community placement rather than in a nursing home. Although efforts have been made to locate an appropriate placement for this individual, no such placement has been found to date.

Also, DOJ, pursuant to the Integration Rule, has demanded that Maryland move all of the children with mental retardation currently cared for in one of the State's facilities because of their medical conditions, into community-based placements.

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of deinstitutionalization for a significant percentage of the population receiving treatment for mental illness in institutional settings. See e.g., E. Fuller Torrey, M.D., *Out of the Shadows, Confronting America's Mental Illness Crisis* (1997).

<sup>4</sup>The action also includes a claim under the Due Process Clause.

These are just a few examples of how the Integration Rule is now being used as a blunt and inefficient instrument to restructure the manner in which the states provide services to individuals with disabilities. If applied elsewhere, the Eleventh Circuit's interpretation of the ADA and the Integration Rule will necessarily affect the manner in which services are provided to individuals with disabilities in any group setting. It is self-evident that, if a state expends enough money, virtually any person can safely and appropriately be served in his or her own home (or in the most integrated community setting). However, legitimate fiscal reality limits the ability of the states to adequately fund community-based placements for *all* individuals with disabilities.

Clearly, no state is immune from such challenges. Even for those states that have initiated "deinstitutionalization" efforts, there still exists the threat of litigation regarding group homes, nursing homes, and other settings which are not adequately "home-like" in nature. In those states where institutions still exist, if litigation has not already commenced, it clearly looms on the horizon.

The Eleventh Circuit suggested below that there was a distinction between an action brought by two individuals seeking to be placed in a community-based setting and a class of plaintiffs seeking the same relief. L.C. by Zimring, 138 F.3d, at 904 n. 10. Such a distinction is illusory at best, and invites an onslaught of small lawsuits seeking placement in the most integrated community setting. Whether the relief is sought by a class or by individuals, the cumulative impact on the available state monies for the delivery of services is the same. It is oppressive.

If the institutional populations drop significantly, the facility-based reimbursement schemes in place nationwide will be severely

undermined because of the diseconomies of scale created by the deinstitutionalization.<sup>5</sup> Further, there exist a finite number of community placements that are appropriate for individuals with disabilities. Consequently, the increased demand for additional community placements will require the states to quickly create and fund such placements. Such a scenario, driven by litigation to provide the most integrated community placements, will drive up the costs of providing services to individuals with disabilities in the community as well.

In addition, the states have also been advised that two federal agencies<sup>6</sup> are now requiring that the states address the ADA's integration requirement (as interpreted by the Eleventh Circuit) in the states' "self-evaluations."<sup>7</sup> The integration requirement is to be applied to all state activities, including the provision of nursing home, institutional and community-based services. According to DOJ and HHS, failure to address the ADA's integration requirement in the states' self-evaluations, will cause the self-evaluations to be incomplete. *Id.*

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<sup>5</sup>/See e.g., David Braddock et al., *The State of the States in Developmental Disabilities: Summary of the Study* (5th Ed.), Chapter 2, pg. 27, where the authors noted, that although institutional populations were continuing to decline:

Aggregate staffing of institutions has declined substantially but less rapidly than the residential census. As a result average daily costs have risen substantially . . .

(Emphasis supplied)

<sup>6</sup>/The DOJ and the Department of Health & Human Services (HHS). See Appendix, pp. 1a to 27a.

<sup>7</sup>/Pursuant to 28 C.F.R. §35.105(a), every public entity is required to conduct a self-evaluation of its "current services, policies, and practices, and the effects thereof," to determine whether they meet the requirements of Title II of the ADA.

The broad-ranging impact on the states of the Eleventh Circuit's holding cannot be underestimated, and is particularly problematic because it relies upon a DOJ interpretation of the Integration Rule which is of recent vintage. Historically, as is discussed further below, both the ADA and the Integration Rule were interpreted in light of services, benefits and aids which were available to nondisabled persons, and which, with reasonable modifications, could be provided to individuals with disabilities as well. The ADA (and its predecessor the Rehabilitation Act of 1973) and the Integration Rule were historically construed to prohibit a public entity from offering separate service, aid and benefit programs to individuals with disabilities than were offered to nondisabled persons. Until approximately 1994, the ADA and Integration Rule were not applied to services, aids and benefits which were available exclusively to individuals with disabilities, and which were not provided to nondisabled persons. *Helen L. v. DiDario*, 46 F.3d 325, 331-332 (3d Cir. 1995), *cert. den. sub nom. Pennsylvania Secretary of Public Welfare v. Idell S.*, 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995).

These changes in the interpretation of the ADA and the Integration Rule have created confusion and uncertainty on the part of the states. The states need direction from this Court regarding the reach of these statutes and regulations. The Eleventh Circuit concluded: "Under the ADA, as with other federal statutes, '[i]nadequate state appropriations do not excuse noncompliance with federal law.'" *L.C. by Zimring*, 138 F.3d, at 904. Assuming *arguendo* that this is correct, inadequate state

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<sup>8</sup>/The Eleventh Circuit also noted that the federal government "matches" state dollars for Medicaid funds spent by the State. *Id.* However, even with matching funds, the States are still obligated to pay 45% of the cost of placement - whatever that cost may be.

appropriations for the costs of massive "deinstitutionalization" will not be a defense to any ADA challenge filed against the states.<sup>9</sup>

Since the states need to know with certainty their funding responsibilities under the ADA, and they need to know whether they must provide, in the most integrated community setting, services *which are provided to individuals with disabilities only*, swift consideration by this Court of these issues is imperative. Further, since the Eleventh Circuit's opinion appears to impact a broad variety of services (and not simply the delivery of mental health services to consumers of such services), it is crucial to the states that this Court exercise its discretionary certiorari jurisdiction to review this case.

**B. This Court is not bound by the DOJ's current interpretation of the Integration Rule, 28 C.F.R. §35.130(d).**

**i. The DOJ's current interpretation of the Integration Rule differs from the interpretation which was in place and followed prior to the enactment of the ADA.**

The Eleventh Circuit Court of Appeals' holding is based, in part, on the Integration Rule, 28 C.F.R. §35.130(d), which provides that "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." In concluding that the ADA required provision of community-based placements, the Eleventh Circuit accorded substantial deference to §35.130(d), stating that: "It is well-settled that where 'a Congress that reenacts

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<sup>9</sup>/Although the Eleventh Circuit asserted that its opinion did not mandate deinstitutionalization, L.C., 138 F.3d, 902, the states contend that the practical effect of the opinion below will be mass deinstitutionalization.

a statute voices its approval of an administrative . . . interpretation thereof, Congress is treated as having adopted that interpretation and this Court is bound thereby." L.C. by Zimring, 138 F.3d 893.

In fact, the "administrative interpretation" so heavily relied upon by the Eleventh Circuit postdates the enactment of the ADA, and should not be given the deference afforded it by the Eleventh Circuit.<sup>10</sup> This case is in sharp contrast to Bragdon v. Abbott, \_\_\_ U.S. \_\_\_, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). In Bragdon, this Court addressed the issue of whether asymptomatic HIV positive persons were "disabled" for the purposes of an action brought pursuant to the ADA. The Court noted: "Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. Every agency to consider the issue under the Rehabilitation Act of 1973 found statutory coverage for persons with asymptomatic HIV." Id., 118 S.Ct.2196, 2206. In the case at bar, prior to enactment of the ADA, the Rehabilitation Act and its regulations were consistently interpreted as *not* requiring community-based placements.

Section 35.130(d) must be viewed in conjunction with 28 C.F.R. §35.130(b)(1)(iv),<sup>11</sup> which requires that agencies not "[p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities *than is provided to others* unless such action is necessary to provide qualified individuals with disabilities with

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<sup>10</sup>/The first circuit court to conclude that the ADA encompassed a requirement that individuals with disabilities be provided with community based placements was the Third Circuit Court of Appeals, in Helen L. v. DiDario, *supra*.

<sup>11</sup>/ 56 Fed. Reg. 35,694, 35,703.

aids, benefits, or services that are as effective *as those provided to others.*" (Emphasis supplied) As discussed below, these two rules, when read together, reflect that the longstanding DOJ interpretation of the ADA was that it afforded relief only in those circumstances where the services and programs at issue were provided to both disabled and nondisabled persons.

The Integration Rule has existed for some time. A similar rule was enacted pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §794, which provided: "The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. §39.130(d). A review of the historical "Section-by-Section Analysis and Response to Comments," which pertain to the predecessor rules to the ADA Integration Rule, suggests that the DOJ previously interpreted the Integration Rule to have a much narrower reach, and limited the application of the regulation to those services, aids or benefits which were provided to both disabled and "other" persons.

In 1984, DOJ's section-by-section analysis regarding the Integration Rule adopted pursuant to the Rehabilitation Act of 1973, 28 C.F.R. §39.130(d), provided:

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of the qualified handicapped persons, subparagraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide handicapped persons with an equal opportunity to participate in or benefit from the

agency's programs or activities. Subparagraph (b)(1)(iv) requires that different or separate aids, benefits or services are as effective as *those provided to others.* Even when separate or different aids, benefits, or services would be more effective, subparagraph (b)(2) provides that *a qualified handicapped person still has the right to choose to participate in the program that is not designed to accommodate handicapped persons.* (Emphasis supplied)

49 Fed. Reg. 35,724, at 35,728.

As recently as 1991, DOJ's section-by-section analysis for the Integration regulations enacted by DOJ to implement and interpret the ADA included similar language. 56 Fed. Reg. 35,694, 35,703.

The comments and analysis prepared by DOJ regarding the pertinent regulations implementing the Rehabilitation of 1973, §§39.130(b)(1)(iv) and (d), when read in conjunction with each other, reflect that these rule provisions have historically been designed to address the provision of services to individuals with disabilities, which services are also available to "others" (or nondisabled persons). Similarly, the regulations enacted in 1991 by DOJ relating to the ADA clearly carried over that theme into the new regulatory scheme.

Further, prior to the enactment of the ADA, the courts did not interpret the Rehabilitation Act or the regulations enacted pursuant to that Act to prohibit institutionalization of individuals with disabilities (or to require provision of services in a community-based setting). *Clark v. Cohen*, 794 F.2d 79, 98 (3d Cir. 1986) (Section 504 prohibits discrimination against the handicapped in

federally funded programs, and imposes no affirmative obligations on the states to furnish services); Garrity v. Gallen, 522 F.Supp. 171, 213 (D.N.H. 1981), *affirmed sub nom. Garrity v. Sununu*, 752 F.2d 727, 729 (1st Cir. 1984) ("We agree that § 504 cannot be construed so broadly as to require deinstitutionalization. Nor do we think that the Department of Health and Human Services envisioned such an interpretation of § 504, as evidenced by the provisions of 45 C.F.R. §84.54, dealing with Education of Institutionalized persons."); and Phillips v. Thompson, 715 F.2d 365, (7th Cir. 1983) ("Appellants appear to contend that, under this statute, appellees had the affirmative duty to create less restrictive community residential settings for them; however there is no contention that these class members, because of their handicap, are being denied access to community residential living that the State of Illinois is affording to others"). See also Conner v. Branstad, 839 F.Supp. 1346, 1356 (S.D.Iowa 1993) (The denial of community-based habilitation services to individuals with mental disabilities does not constitute a viable cause of action under § 504).

Where, as is the case here, prior administrative and judicial interpretations have settled the meaning of the pertinent provisions of the Rehabilitation Act, repetition of the same language in the ADA indicates, as a general matter, Congressional intent to incorporate those administrative and judicial interpretations as well. Bragdon v. Abbott, 118 S.Ct. 2196, 2208. When the ADA was enacted, the "settled" administrative and judicial interpretation of the pertinent statutory and rule provisions was that §504 did not require either deinstitutionalization or the provision of services provided solely to individuals with disabilities in a most integrated community setting. Therefore, this interpretation was "incorporated" into the ADA, and the Eleventh Circuit erred in

determining that the contrary was true. This issue of law is of fundamental importance to the states for reasons set forth above, and should be addressed by this Court by the instant petition.

**ii. DOJ's administrative interpretation of the ADA, as embodied in the Integration Rule, is erroneous.**

As this Court has recently stated, in evaluating the correctness of an administrative interpretation of a statute:

Under that analysis, we first ask whether Congress has "directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If we determine that Congress has not directly spoken to the precise question at issue, we then inquire whether the agency's interpretation is reasonable. (Emphasis supplied)

National Credit Union Admin. v. First Nat. Bank & Trust Co.,  
\_\_\_ U.S. \_\_\_, 118 S.Ct. 927, 938 (1998).

In the action below, the Eleventh Circuit relied upon three provisions of the "Findings and Purpose" section of the ADA, Title 42 U.S.C. §§12101(a)(2), (3) and (5), in concluding that the ADA required the provision of services in the most integrated community setting available. Section 12101(a)(2) provides:

historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

§12101(a)(3) provides:

discrimination against individuals persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Section 12101(a)(5) provides:

individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

From these statutory subsections, the Eleventh Circuit inferred a Congressional intent to eliminate segregation of individuals with disabilities, and a corollary intent to eliminate institutionalization. However, a comprehensive review of the ADA will *not* reflect any Congressional mandate that individuals with disabilities presently residing in institutions be placed in integrated community settings. Furthermore, in the ADA Congress has not stated that institutionalization of individuals with disabilities for treatment of their disability is *per se* discrimination. 42 U.S.C. §§12101 *et seq.*

The provisions of §12101(a)(3) do not reflect any Congressional finding that "institutionalization" *per se* is discriminatory, but provide a "laundry list" of areas where discrimination persists. This statutory provision no more stands for the premise that institutionalization must be eliminated, than it stands for the premise that employment, housing, public accommodations, education, transportation, and health services

must be eliminated - because discrimination *can* occur in these settings as well. §12101(a)(3).

Thus, the only conceivable subsections of the Act that the Eleventh Circuit could have relied on in determining that Congress "directly spoke" to the issue of institutionalization would be §12101(a)(2) and (5), and again these subsections do not clearly express such an intent. Rather, these subsections appear to be directed toward the "separate but equal" treatment historically accorded individuals with disabilities. *See e.g.* 135 Cong. Rec. S10897 (9/7/89).<sup>12</sup> Congress was concerned that, historically, *separate* services, benefits and aids were provided to individuals with disabilities rather than affording them the option of participating in the same services, benefits or aids that were provided to persons without disabilities. *Such is not the circumstance here, where the services at issue are not offered to individuals who are not disabled.*

Given the lack of any express Congressional statement regarding deinstitutionalization, this Court must address the issue of whether the Eleventh Circuit's interpretation of the Integration Rule (requiring provision of inclusive community-based placements, where appropriate, for delivery of services, aids and

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<sup>12</sup>/In the Senate discussion regarding the ADA, Senator Metzenbaum stated:

Now, as we prepare to vote on the ADA, we face a decision. We're at a turning point. Do we want to extend civil rights protections to Americans with disabilities? Do we want to build on the great American promise of inclusion, and bring people with disabilities into the fold?

"Our failure to do so would be like turning back the clock. *It would be tantamount to dredging up a 'whites only' sign and hanging it at a nearby lunchcounter.*" *Id.* (Emphasis supplied)

benefits which are *only* provided to individuals with disabilities) is reasonable. Amici contend that such a construction is *not reasonable*.

Congress knows very well how to impose an integration mandate on the states. See *e.g.*, Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993) (Individuals with Disabilities Education Act requires mainstreaming of disabled children). Also, Congress provided for an integration mandate in the ADA—but not in Title II and not one that affected states. In Title III, Congress required that services offered to the disabled by “public accommodations” be provided in an integrated setting.<sup>13</sup> Public accommodations, however, are defined as private entities, not public entities.<sup>14</sup> And even in this instance, Congress’ intention was only to eliminate separate-but-equal services to the disabled.

This Court has previously held on several occasions that the predecessor to the Americans with Disabilities Act, the Rehabilitation Act, was designed to provide evenhanded treatment between individuals with disabilities and nondisabled persons. Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 721-722, 83 L.Ed.2d 661 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); Traynor v. Turnage, 485 U.S. 535, 108 S.Ct. 1372, 1382, 99 L.Ed.2d 618 (1988); and Bowen v. American Hosp. Ass’n, 476 U.S. 610, 106 S.Ct. 2101, 2119 (1986). The legislative history of Title II of the ADA confirms Congress’s intent to extend the Rehabilitation Act’s

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<sup>13</sup>Title 42 U.S.C. §12182(b)(1)(B): “Integrated settings.—Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”

<sup>14</sup>*Id.*, §12181(7).

proscription to all state and local government programs and services, irrespective of funding. See H.R.Rep. No. 101-485(II), 101st Cong., 2d Sess. 84 (1990) U.S.Code Cong. & Admin.News 1990 pp. 267, 303, 366-367. The regulations implementing Title II “confirm the uniformity of interpretation between the ADA and the Rehab Act.” 28 C.F.R. § 35.130. Therefore, it follows that the ADA must be interpreted so as assure evenhanded treatment between individuals with disabilities and others. At least one circuit court, in addressing this issue, has concluded that the ADA reaches differences in treatment accorded disabled persons versus nondisabled persons only. Lincoln CERCPAC v. Health and Hospitals Corp., 147 F.3d 165 (2nd Cir. 1998).<sup>15</sup> This is in contrast to the Eleventh Circuit’s decision below that the ADA bars the states from providing public services for individuals with disabilities, *which services are not provided to individuals who are not disabled*, in a segregated setting. L.C., 138 F.3d, at 897.

To the extent that individuals sue for particular services which are *only* available to individuals with disabilities, and sue for those services in a community-based setting, no ADA violation exists. This is so because the ADA *does not incorporate any requirement or obligation that the state provide services to disabled persons, when those same services are not provided to nondisabled persons.*

**C. Alternatively, the statute violates the Tenth and Eleventh Amendments to the United States Constitution.**

At pages 12-16 of the Petition, Petitioners assert that if the Eleventh Circuit has properly construed the reach of the ADA and

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<sup>15</sup>This decision supports Petitioner’s argument that there exists a conflicts between the circuits on the issues presented below. Petition, pp. 6-10.

its Integration Rule, then the ADA conflicts with this Court's holdings on §5 of the Fourteenth Amendment to the United States Constitution. This argument is essentially one that the ADA violates the Tenth and Eleventh Amendments to the United States Constitution.

Title 42 U.S.C. §12101(b)(4) provides the following statement of Congressional purpose supporting the ADA:

to invoke the sweep of congressional authority, including **the power to enforce the fourteenth amendment and to regulate commerce**, in order to address the major areas of discrimination faced day-to-day by people with disabilities.  
(Emphasis supplied)

Title II of the ADA, which is implicated in this action, is clearly adopted pursuant to the authority of §5 of the Fourteenth Amendment. Amos v. Maryland Dept. of Public Safety and Correctional Services, 126 F.3d 589, 617 (4th Cir. 1997).

Congress has broad power to enforce the Fourteenth Amendment. In Ex Parte Virginia, 100 U.S. 339, 345-346, 25 L.Ed.2d 676 (1879), this Court described the reach of the legislative power under §5: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power."

However, "[a]s broad as the congressional enforcement power is, it is not unlimited." City of Boerne v. Flores, \_\_\_ U.S. \_\_\_, 117

S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997) (quoting Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970)). That power is "remedial" in nature, and is limited to enforcing the provisions of the Fourteenth Amendment to the United States Constitution. Boerne, *supra*. Congress lacks the constitutional authority to legislate the substance of the Fourteenth Amendment. Id. It is critical that these boundaries of Congressional authority be observed, because of the powerful constraints the Tenth Amendment to the federal Constitution places on the powers of the United States. Civil Rights Cases, 109 U.S. 3, 14-15, 3 S.Ct. 18, 24, 27 L.Ed. 835 (1883).

Given the above-described principles, if a federal statute like the ADA is to confer upon persons a right to sue the states over nonenforcement of particular terms (or alternatively obligates the states to comply with a federal regulatory scheme), then the statute must find some authority in the Constitution under which the states have ceded sovereignty over such affairs to the federal government.

Amici assert that the ADA exceeds the authority of §5 of the Fourteenth Amendment, to the extent that it is applied to the states and *is interpreted to require the states to provide substantive services to individuals with disabilities, when those services are not provided to nondisabled persons*. Clearly, there exists no duty to provide substantive services or services in the most integrated community setting under the Fourteenth Amendment, or indeed any other provision of the United States Constitution. *See e.g.* Youngberg v. Romeo, 102 S.Ct. 2452, 457 U.S. 307, 73 L.Ed.2d 28 (1982) (State has considerable discretion in determining the scope and nature of the services it will provide, and need only exercise professional judgment in determining which services are appropriate).

It would appear that the ADA is now being used in ways that Congress neither anticipated nor authorized. If the Eleventh Circuit's interpretation of the ADA and the Integration Mandate is correct, the present interpretation of the ADA will have catastrophic effects on the states' fiscs. To the extent that the language of the ADA can somehow be interpreted to require that the states provide services (which are only provided to individuals with disabilities) in the most integrated community setting, then it is imperative that this Court consider now whether Congress exceeded its §5 authority in enacting the statutory scheme, and has improperly intruded on the sovereignty of the states.

### **CONCLUSION**

The Amici urge this Court to grant certiorari review and reverse the opinion of the Eleventh Circuit Court of Appeals below.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General

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DEPARTMENT OF HEALTH & HUMAN SERVICES  
Health Care Financing Administration

Center for Medicaid and State Operations

7500 Security Boulevard  
Baltimore, MD 21244-1850

July 29, 1998

Dear State Medicaid Director:

In the Americans with Disabilities Act (ADA), Congress provided that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Title II of the ADA further provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be the subject of discrimination by any such entity." 42 U.S.C. § 12132. Department of Justice regulations implementing this provision require that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

We have summarized below three Medicaid cases related to the ADA to make you aware of recent trends involving Medicaid and the ADA.

In L.C. & E.W. v. Olmstead, patients in a State psychiatric hospital in Georgia challenged their placement in an institutional setting rather than in a community-based treatment program. The United States Court of Appeals for the Eleventh Circuit held that placement in an institutional setting appeared to violate the ADA because it constituted a segregated setting,

and remanded the case for a determination of whether community placements could be made without fundamentally altering the State's programs. The court emphasized that a community placement could be required as a "reasonable accommodation" to the needs of disabled individuals, and that denial of community placements could not be justified simply by the State's fiscal concerns. However, the court recognized that the ADA does not necessarily require a State to serve everyone in the community but that decisions regarding services and where they are to be provided must be made based on whether community-based placement is appropriate for a particular individual in addition to whether such placement would fundamentally alter the program.

In Helen L. v. DiDario, a Medicaid nursing home resident who was paralyzed from the waist down sought services from a State-funded attendant care program which would allow her to receive services in her own home where she could reside with her children. The United States Court of Appeals for the Third Circuit held that the State's failure to provide services in the "most integrated setting appropriate" to this individual who was paralyzed from the waist down violated the ADA, and found that provision of attendant care would not fundamentally alter any State program because it was already within the scope of an existing State program. The Supreme Court declined to hear an appeal in this matter; thus, the Court of Appeals decision is final.

In Easley v. Snider, a lawsuit, filed by representatives of persons with disabilities deemed to be incapable of controlling their own legal and financial affairs, challenged a requirement that beneficiaries of their State's attendant care program must be mentally alert. The Third Circuit found that, because the essential nature of the program was to foster independence for individuals limited only by physical disabilities, inclusion of individuals incapable of controlling their own legal and financial affairs in the program would constitute a fundamental

alteration of the program and was not required by the ADA. This is a final decision.

While these decisions are only binding in the affected circuits, the Attorney General has indicated that under the ADA States have an obligation to provide services to people with disabilities in the most integrated setting appropriate to their needs. Reasonable steps should be taken if the treating professional determines that an individual living in a facility could live in the community with the right mix of support services to enable them to do so. The Department of Justice recently reiterated that ADA's "most integrated setting" standard applies to States, including State Medicaid programs.

States were required to do a self-evaluation to ensure that their policies, practices and procedures promote, rather than hinder integration. This self-evaluation should have included consideration of the ADA's integration requirement. To the extent that any State Medicaid program has not fully completed its self-evaluation process, it should do so now, in conjunction with the disability community and its representatives to ensure that policies, practices and procedures meet the requirements of the ADA. We recognize that ADA issues are being clarified through administrative and judicial interpretations on a continual basis. We will provide you with additional guidance concerning ADA compliance as it becomes available.

I urge you also, as we approach the July 26 anniversary of the ADA, to strive to meet its objectives by continuing to develop home and community-based service options for persons with disabilities to live in integrated settings.

If you have any questions concerning this letter or require technical assistance, please contact Mary Jean Duckett at (410) 786-3294.

Sincerely,

/s/

Sally K. Richardson

Director

cc: All HCFA Regional Administrators

All HCFA Association Regional Administrators for Medicaid  
and State Operations

Lee Partridge

Director, Health Policy Unit  
American Public Welfare Association  
810 First Street, N.W.  
Washington, DC 20002-4205

Joy Wilson

Director, Health Committee  
National Conference of State Legislatures  
Hall of the States  
444 N. Capital Street, N.W. Suite 515  
Washington, DC 20001

Jennifer Baxendell

National Governor Association  
Hall of the States  
444 N. Capital Street, N.W. Suite 267  
Washington, DC 20001

U. S. Department of Justice

Civil Rights Division

Disability Rights Section

Post Office Box 66738

Washington, D.C. 20035-6738

July 6, 1998

Mr. Michael Auberger

ADAPT

Post Office Box 9598

Denver, Colorado 80209

Mr. Bob Kafka

ADAPT of Texas

1339 Lamar Square Drive

Suite 101

Austin, Texas 78704

Dear Mr. Auberger and Mr. Kafka:

Thank you for your letter seeking clarification of the Americans with Disabilities Act's (ADA) self-evaluation requirements as they relate to the "integration mandate" of title II.

The ADA requires every public entity to conduct a self-evaluation of its "current services, policies, and practices, and the effects thereof, that do not meet the requirements of [the

title II regulations] . . . ." 28 C.F.R. 35.105(a). One of the fundamental requirements of the title II regulations is that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d).

This integration requirement applies to all State activities, including the provision of nursing home, institutional, and community-based services to people with disabilities. L. C. v. Olmstead, No. 97-8358 (11th Cir. April, 8, 1998); Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995). Therefore, a State must review, as part of its self-evaluation, its policies and practices regarding the provision of nursing home, institutional, and community-based services to ensure that individuals with disabilities receive services in the most integrated setting appropriate to their needs.

If a State has failed to address the ADA's integration requirement in its self-evaluation, then its self-evaluation is incomplete. In these circumstances, it would be appropriate for state officials to address the integration issue. As provided in the Department's implementing regulation at 28 C.F.R. 35.105(b), interested persons, including individuals with disabilities or organizations representing individuals with disabilities, must be given an opportunity to participate in the self-evaluation process.

Sincerely,

/s/

John L. Wodatch

Chief

Disability Rights Section

Independence Now, Inc.

818 Roeder Road

Suite 202

Silver Spring, Maryland 20910

Voice: 301-587-4162 / FAX: 301-588-3951

TDD for Disabled: Maryland Relay Service 1-800-735-2258

Martin P. Wasserman, M.D., J.D.

Secretary

Department of Health and Mental Hygiene

201 West Preston Street

Baltimore, Maryland 21201

August 28, 1998

Dear Dr. Wasserman:

In a July 29, 1998 letter to all State Medicaid Directors, Sally Richardson of the Health Care Financing Administration reminded States of their responsibilities under the Americans Disabilities Act to provide services for people with disabilities in the most integrated settings. With that goal in mind, I am writing to request a copy of the [sic] your Department's self-evaluation plan (specific to the Medicaid program) required under the Americans with Disabilities Act. Further, I would like to know how the Department secured comments on the plan from the disability community. I will appreciate receiving this information by September 15, 1998.

Thank you.

Sincerely,

/s/

Catherine A. Raggio

Executive Director

cc: Bea Rodgers

United Way of Center Maryland

5807 Harford Road

Baltimore, Maryland 21214

(410) 444-1400

FAX (410) 444-0825

TTY Use: (800) 735-2258

August 27, 1998

Martin Wasserman, MD JD

Department of Health & Mental Hygiene

201 W. Preston Street Suite 500

Baltimore, Maryland 21201

Dear Secretary Wasserman:

In your role as Maryland's Medicaid Director, I would appreciate your sending me a copy of Maryland's ADA Self-Evaluation Plan (under Title II of the Americans with Disabilities Act). I am especially interested in seeing the details of how the Plan deals with the provision of nursing home, institutional and community-based services to people with disabilities in the most integrated setting appropriate.

I would further appreciate your sending me a copy of the Plan within the next ten (10) days.

In anticipation of receiving this information from you, I remain,

Sincerely,

/s/

Frank Printer

Executive Director

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
Region III

Health Care Financing Administration

Suite 216, The Public Ledger Bldg.

150 S. Independence Mall West

Philadelphia, Pennsylvania 19106

September 2, 1998

MEDICAID LETTER NO: 98-24

SUBJECT: Questions Concerning the Helen L. State  
Medicaid Directors Letter

On July 29, 1998, the Director of the Center for Medicaid and State Operations wrote to advise you of recent trends involving Medicaid and the Americans with Disabilities Act (ADA). She noted that the Attorney General has indicated that under the ADA, States have an obligation to provide services to people with disabilities in the most integrated setting appropriate to their needs. Pursuant to the ADA, reasonable steps should be taken if the treating professional determines that an individual living in a facility could live in the community with the right mix of support services to enable them to do so. According to the Department of Justice, the ADA's "most integrated setting" standard applies to States, including State Medicaid programs. The letter also summarized three Medicaid cases related to the ADA, two of which are binding in the third circuit which includes Pennsylvania, New Jersey and Delaware.

The Director discussed the federal regulation at 28 C.F.R. § 33.105 (reproduced below) establishing a requirement, based on the § 504 regulations for federally assisted and federally conducted programs that a public entity evaluates its current policies and practices to identify and correct any that are not consistent with the requirements of this part. The purpose of the self-evaluation is to ensure that your policies, practices and procedures promote, rather than hinder integration. This self-evaluation should have included consideration of the ADA's integration requirement. She also advised that, to the extent your State Medicaid program has not fully completed its self-evaluation process, you should do so now, in conjunction with the disability community and its representatives to ensure that policies, practices and procedures meet the requirements of the ADA. Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of § 504.

#### 35.105 Self-evaluation.

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with

disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

Since the July 29, 1998, SMD letter, we have received questions concerning the letter and the ADA requirements. While we do not have all the answers at this point, we will be working with our Office of General Council and the Department of Justice to clarify as many issues/questions as possible. In this light, we would like to ascertain if you have any questions about the July 29 letter and other related ADA issues. Please provide a list of such questions to Bill Davis

of my staff by September 8, 1998. Bill's phone number is (215) 861-4204 and his E-mail address is Wdavis@HCFA.gov.

Sincerely,

/s/

Claudette V. Campbell

Associate Regional Administrator

Division of Medicaid and State Operations

American Public Human Services Association  
National Association of State Medicaid Directors

September 16, 1998

To: State Medicaid Directors

From: Bruce Bullen

Re: ADA Lawsuits

By now, you are aware of the debate over how recent judicial interpretations of the Americans with Disabilities Act (ADA) may seriously impact state Medicaid programs. Both the July 29th Dear State Medicaid Director letter from Sally Richardson, and the July 6th letter from the Department of Justice to ADAPT have brought this issue to national attention.

Most states, if not all, have already been contacted by disability advocates asking for self-evaluations of each state's policies and practices regarding the provision of nursing home, institutional, and community-based services to ensure that individuals with disabilities receive services in the "most integrated setting appropriate to their needs."

Some states have heard, both from ADAPT and from sources within HRS, that it is the beneficiary and his/her family, and not the state or clinicians that will ultimately decide what the "most integrated setting appropriate" will be.

Potential implications include: waiting lists under the 1915 (c) waivers could well be determined to be a violation of ADA; and states could be faced with the creation of an entitlement to community care *in addition* to the current entitlement to institutional care. Ultimately, states could be faced with significantly raising taxes to pay for care, making eligibility criteria so strict that fewer people can get services, or even dismantling their 1915 (c) waiver programs entirely.

The Executive Committee of NASMD is taking this issue very seriously and is currently consulting with staff attorneys to determine if the Justice Department's interpretation of the ADA is valid, and what our legal options will be.

We will continue to keep you aware of our attempts to reach consensus on this issue.

ADAPT

234 Lord Byron Lane  
Texas, Maryland 21030  
(410) 666-5484  
FAX: (410) 666-5080

September 9, 1998

Martin P. Wasserman, M.D., J.D.  
Secretary, Department of Health & Mental Hygiene  
201 West Preston Street  
Baltimore, Maryland 21201

re: "Most Integrated Setting"

Dear Dr. Wasserman:

ADAPT requests you do the following:

- 1) Give us a copy of Maryland's most current self-evaluation conducted to comply with 28 C.F.R. 35.105 (a), including Maryland's evaluation with respect to nursing facilities and ICF-MR's, as required by 28 C.F.R. 35.130 (d). **This is our third request;**

- 2) Provide us a written commitment that no person with a disability will ever be forced into an institution because of lack of funding for community services;
- 3) Write a letter with ADAPT informing ALL folks in nursing homes, ICF-MR facilities and other institutions about their options for community services and consumer community organizations of people with disabilities that can give them information;
- 4) Fund a training [sic] designed by ADAPT for consumers who can help folks getting out of nursing homes, ICF-MR facilities and other institutions.
- 5) Please respond by fax on or before Monday, September 14th, by 2 p.m. People have a right to be free.

There's No Place Like Home!

/s/

Crosby King, ADAPT, and other ADAPT freedom speakers

cc: Maryland Disability Law Center  
National ADAPT  
Governor Glendening

ADAPT  
234 Lord Byron Lane  
Texas, Maryland 21030  
(410) 666-5484  
FAX: (410) 666-5080

September 12, 1998

Mary Pat Farkas, Special Assistant  
MCPA-MDHMH  
201 W. Preston Street  
Baltimore, Maryland 21201

Re: Maryland's Title II Self-Evaluation

Dear Ms. Farkas:

We got your letter dated September 9, 1998 on the 11th saying that staff are working on a draft and that a copy of the self evaluation would be forwarded as soon as it is complete. We have not received a response to our third request, however, also dated Sept. 9th, wherein we made it quite clear that a more complete response is required at this point.

The Americans with Disabilities Act (ADA) states that programs must be provided in the "most integrated setting" and must offer the "least restrictive alternative" in service delivery. This law was tested in Pennsylvania's Medicaid

nursing home program, when in 1995 the Supreme Court let stand the 3rd Circuit Court's decision on the case of Helen L. She was a woman forced to live in a nursing home under the Medicaid program, because no other choices were offered to her. The Court decided in her favor. She now lives free, in her own home, with appropriate needed services. The TWO Marylanders for whom we filed civil rights complaints on Sept. 10, 1998 are still incarcerated in nursing homes for the crime of disability.

A component of the Self Evaluation is supposed to address how Maryland's policies, practices and procedures promote rather than hinder full integration in the community. According to a July 29, 1998 letter by Sally Richardson HCFA Director to all State Medicaid Directors, the self evaluation should have included consideration of the ADA's integration requirement. **"The State has an obligation to provide services to people with disabilities in the most integrated setting appropriate to their needs.** Reasonable steps should be taken if the treating professional determines that an individual living in a facility could live in the community with the right mix of support services to enable them to do so. The Department of Justice recently reiterated that the ADA's most integrated setting standard applies to States, including State Medicaid Program." (emphasis added)

Moreover, Maryland was required to have completed the self evaluation six years [sic] and is NOW required to do so "in conjunction with the disability community . . . to ensure that policies, practices and procedures meet the requirements of the ADA."

ADAPT has sent three letters to Secretary Wasserman to request the ADA Self-evaluation Plan, as it relates to most integrated setting for services now offered in nursing homes and ICF-MRs. With this fourth letter, Maryland ADAPT demands immediate review of any drafts as they relate to most integrated setting, including action plan timetables for compliance with integrating people into their communities.

FREE OUR PEOPLE!

/s/

Crosby King

Organizer

cc: The Honorable Martin P. Wasserman, M.D., J.D.  
Joseph Millstone  
John Wodatch  
MDLC  
National ADAPT